Supreme Court, U.S.
FILED
991743 FEB 29 2000
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK BUCKLEY,

Petitioner,

v.

CITY OF PORTAGE; RICHARD J. WHITE, Chief of Police, Individually and in his official capacity as Chief of Police of the Portage Police Department, Jointly and Severally; MICHAEL L. STAMPFLER, City Manager, Individually and in his capacity as Portage City Manager, Jointly and Severally

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SCOTT GRAHAM *
GEMRICH, MOSER, BOWSER,
MURPHY & GRAHAM, LLP
222 SOUTH WESTNEDGE AVENUE
KALAMAZOO, MI 49007
(616) 382-1030

Counsel for Petitioner

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT SHOULD REVIEW THIS CASE IN ORDER TO CORRECT CONFUSION REGARDING THE RELATIONSHIP BETWEEN THE TRIAL COURT'S DETERMINATION OF WHETHER SPEECH IS PROTECTED IN ITS ENTIRETY IF A PORTION IS DIRECTED AT MATTERS OF PUBLIC CONCERN, AND THE TRIAL COURT'S SUBSEQUENT APPLICATION OF THE BALANCING TEST DESCRIBED IN *PICKERING v. BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL 205*, 391 U.S. 503 (1968), AND *CONNICK v. MEYERS*, 461 U.S. 138.

II. WHETHER THE COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO CORRECT THE MAJORITY DECISION IN THIS CASE.

PARTIES TO THE PROCEEDING

Petitioner

Patrick Buckley is an individual and has no corporate affiliations.

Respondents

The City of Portage; Richard J. White, Chief of Police, Individually and in his official capacity as Chief of Police of the Portage Police Department; Michael L. Stampfler, City Manager, individually and in his capacity as Portage City Manager.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . . . .

PARTIES TO THE PROCEEDINGS . . . . . .

TABLE OF CONTENTS . . . . . .

TABLE OF AUTHORITIES . . . . . .

OPINIONS BELOW . . . . . .

JURISDICTION . . . . . .

CONSTITUTIONAL PROVISIONS . . . . . .

STATUTORY PROVISIONS . . . . . .

STATEMENT OF THE CASE . . . . . .

REASONS FOR GRANTING THE WRIT . . . . . .

REVIEW OF THIS CASE IS NECESSARY SO THAT THE COURT CAN RESOLVE CONFUSION REGARDING THE CONCEPTS OF DETERMINING WHEN SPEECH BY PUBLIC EMPLOYEES IS PROTECTED, AND HOW THIS DETERMINATION RELATES TO THE BALANCING OF THE RIGHT TO MAKE SUCH SPEECH AGAINST THE INJURY WHICH SUCH SPEECH MIGHT CAUSE TO A MUNICIPALITY . . . . . .

IN ADDITION, THE COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO CORRECT THE ERROR FOUND IN THE MAJORITY OPINION IN THIS CASE . . . . . .

CONCLUSION . . . . . .

APPENDIX

Appendix A
Court of Appeals Opinion - 9/16/99 . . . . . .

Appendix B
District Court Order - 6/10/98 . . . . . .

Appendix C
Court of Appeals Order - 12/1/99 . . . . . .

Appendix D
THE LOOKOUT, Vols. LXXX and LXXXI, - 3/5/97 and 3/33/97 . . . . . .

TABLE OF AUTHORITIES

Cases:

Buckley v. City of Portage, et al.,
No 4:97-CV-105 vi

Buckley v. City of Portage, et al.,
No. 98-1784, ___ F. 3d ___
(6th Cir. 9-16-99) . . . . . vi, 5

Chappel v. Montgomery,
131 F. 3d. 564 (6th Cir. 1997) 5, 7, 8

Connick v. Meyers,
461 U.S. 138 (1983) . . . . . ii, 4

Lucas v. Sottile's Inc., et al.,
No. 98-1876 (6th Cir. 2-18-00) 5, 7

*Pickering v. Board of Education of
Township High School District 205*,
391 U.S. 503, 88 S. Ct. 1731 (1968) . . . . . ii, 4, 6

Statutes:

28 U.S.C. § 1201 . . . . . .
28 U.S.C. § 1331 . . . . . .
42 U.S.C. § 1983 . . . . . .

OPINIONS BELOW

The District Court's Order is attached at Appendix ___ (*Buckley v. City of Portage, et al.*, No. 4:97-CV-105) (unpublished). The unpublished Opinion of the United States Court of Appeals for the Sixth Circuit is attached at Appendix ___. *Buckley v. City of Portage, et al.*, No. 98-1784, ___ F.3d ___ (6th Cir. 9-16-99) (unpublished). The Order denying rehearing is attached at Appendix _____. *Buckley v. City of Portage, et al.*, No. 98-1783, ___ F. 3d ___ (6th Cir. 12-1-99) (unpublished).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on September 16, 1999. The Court entered an Order denying Rehearing on December 1, 1999. The basis for this Court's jurisdiction is 28 U.S.C. §2101.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I TO THE UNITED STATES CONSTITUTION.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV, SECTION 1, TO THE UNITED STATES CONSTITUTION.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983: **Civil action for deprivation of rights.**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner is a police officer who is employed by the City of Portage, Michigan. Over a period of five (5) years, beginning in 1992, Petitioner published eighty-one (81) issues or volumes of a written publication entitled *THE LOOKOUT*, accurately described below as "a newsletter that often criticized (police) department officials and policies." (Appendix D)

Petitioner did not include his name on the publications. City personnel, including the individual Respondents, were well aware that Petitioner authored *THE LOOKOUT*.

The police department took no action against Petitioner based upon Petitioner's publication of the first seventy-nine (79) issues. However, in 1997, after Petitioner published Volumes 80 and 81 of the newsletter, Respondents suspended Petitioner from his employment for a period of twenty (20) days without pay, apparently based upon the content of Volumes 80 and 81. (Appendix D) The suspension triggered the present action.

The trial court had jurisdiction over this matter based upon 28 U.S.C. §1331 and 42 U.S.C. §1983.

Petitioner published Volume 80 on March 5, 1997 (Appendix ___). One section of the Volume was entitled "*Committees*." The next section was entitled "*Rules Change Again*." These articles talk specifically about the fact that a policy had been adopted which indicated that more than four (4) officers would be assigned to each shift. The article talked about the fact that, because two (2) of the four (4) cars were "early cars," for some period of time, only two (2) officers patrolled the streets. The articles criticized the fact that no

overtime was authorized for street patrols when overtime was frequently authorized for "committee meetings." The article asked that the Department simply "fill" the City Districts with patrol officers. The article also stated, in part,

> Besides the danger factor for us, the citizens of Portage are getting short-changed. What kind of catastrophe is it going to take before you see the light? What kind of reasoning is it to deny overtime to fill the districts? (Appendix ___)

On March 11, 1997, Volume 81 of *THE LOOKOUT* was published. (Appendix __) This Volume continued the criticism relating to overtime. Specifically, the article in question, entitled *Open Letter to Chip* criticized the fact that overtime had been approved for physical fitness program testing. It states, in part,

> And we continue to work with four officers. Over ten thousand people per officer. But by golly, we'll pay through the nose for those ultra productive committees. (Appendix ___)

The criticism relating to inadequate staffing continued:

> Were you aware that all of the detectives will be home before the street lights come on now? Powers that be put their collective heads together and determined that there is absolutely nothing that needs to be detected after it turns dark. They will continue to work ten hour days but they will all be on one shift - 0800-1800 hours. Sure, the collective heads will work eight hour shifts so there will be a six

> hour overlap of command. And naturally two of the detectives will take their pagers home "*just in case they are needed.* Talk about overtime! But will still work the streets without all the districts being filled." (Appendix ___)

Volume 81 further criticized the handling of evidence at a fatal fire scene. Specifically, the article was critical of the fact that a command officer promised the fire victim's "significant other" that nothing had been removed from the fire scene, when the same person had received a promise that nothing had been removed from the scene. (Appendix ___)

Volume 81 further criticized the hiring of a police officer. The article indicated, in part, that the Department failed to follow established hiring procedures, and rather extended inappropriate consideration to an applicant because she was a friend of a Deputy Chief. (Appendix _____)

On June 5, 1997, the Chief of Police gave Petitioner a two page document entitled "NOTICE OF SUSPENSION." (Appendix _____.) Petitioner was suspended without pay for a period of twenty (20) days.

REASONS FOR GRANTING THE WRIT

REVIEW OF THIS CASE IS NECESSARY SO THAT THE COURT CAN RESOLVE CONFUSION REGARDING THE CONCEPTS OF DETERMINING WHEN SPEECH BY PUBLIC EMPLOYEES IS PROTECTED, AND HOW THIS DETERMINATION RELATES TO THE BALANCING OF THE RIGHT TO MAKE SUCH SPEECH AGAINST THE INJURY WHICH SUCH SPEECH MIGHT CAUSE TO A MUNICIPALITY.

IN ADDITION, THE COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO CORRECT THE ERROR FOUND IN THE MAJORITY OPINION IN THIS CASE.

In *Pickering v. Board of Education of Township High School District 205*, 351 U.S. 563 (1968), and *Connick v. Myers*, 401 U.S. 138 (1983), this Court decided cases establishing standards for evaluating the free speech rights of public employees. In *Connick*, the Court held, in part, that the entire speech is protected where some portion of the speech touches upon matters of public concern. *Connick*, 461 U.S. at 149. In *Pickering*, the Court described the need to balance the right to utter protected speech against the harm to the governmental entity involved. *Pickering*, 351 U.S. at 568.

In the years which have passed since the decision in *Connick*, it appears that some courts have confused these concepts, thereby leading to inconsistent decisions. The

present case is an example of this. Here, in claiming to analyze the legal question of whether Petitioner's speech related to matters of public concern, the majority really seems to have resolved the factual issue of whether the disruption to the City outweighed the Petitioner's right to publish the speech. The majority appeared to do this because it concluded that only a portion of the speech was directed at matters of public concern. Petitioner requests the court to grant certiorari in this case in order to consider the relationship between situations in which only a portion of public speech is directed at matters of public concern, and the separate question of whether the right to utter protected speech is outweighed by the orderly administration of the public organization.

Petitioner does not seek review in this Court merely because he is dissatisfied with the 2-1 decision issued by the Sixth Circuit Court of Appeals. Petitioner requests the Court to review this matter in order to both correct the decision, and to provide guidance to the Circuit Court as a whole, which is deciding the question of whether speech is directed at matters of public concern in a very inconsistent manner. Petitioner's position is illustrated by the position described in the dissent in this case (*Buckley v. City of Portage, et al.*, 98-1783) (6th Cir. 9-16-99) (Jones, J., dissenting), and through a comparison of this case to the published opinions of *Chappel v. Montgomery County Fire Protection District No. 1*, 131 F. 3d 564 (6th Cir. 1997), and *Lucas v. Sottile's Inc., et al.*, No. 98-1876 (6th Cir. 2-18-00).

In *Chappel v. Montgomery County Fire Protection District No. 1*, 131 F. 3d. 564 (6th Cir. 1997), the Court considered a situation in which a man identified as Chappel was re-employed as a firefighter. Chappel took paramedic training and advocated the implementation of a paramedic

program in the fire and ambulance district in which he worked. Chappel also voiced a concern that the ambulance district's finances were being improperly handled because the fire chief served on the fire district's board of trustees and on the ambulance district's board of trustees. The chief's daughter was the ambulance district's office manager and Chappel stated that he believed not adequately pursuing the collection of debts. Chappel also believed that the chief's wife was receiving unearned benefits from the districts. Chappel aired these concerns at a public meeting and took the opportunity at that meeting to discuss the importance of having a paramedic service. After Chappel spoke publicly, he was assigned from a fire station out of which an ambulance operated to a fire station out of which no ambulance operated. His complaints were reported in local newspapers and he continued to attend public meetings and voice complaints.

Ultimately, the ambulance district implemented a paramedic program. Chappel applied for a position as a paramedic and was not hired. He filed a lawsuit against the fire chief, the physician who refused to hire him as a paramedic, the assistant fire chief and other members of the fire board. Chappel alleged that the adverse employment action taken against him for his "persistent criticism" of the fire chief, the chief's family and the fire and ambulance districts was improper. Chappel further alleged that retaliatory action occurred by the Defendants in assigning him to a fire station where he would not be able to use his paramedic skills and for refusing to hire him as a paramedic.

The Court found that Chappel's speech involved matters of public concern and that his interest in that speech outweighed any Government interest in regulating his speech. The Court stated, in part,

> Matters of public concern are those that may be "characterized . . . as relating to any matter of political, social or other concern to the community." . . . "speech on such matters is protected because the First Amendment is concerned not only with the speaker's interest in speaking, but also the public's interest in receiving the information. . . . "In fact, the core value of the free speech clause of the First Amendment" is "the public interest in having free and unhindered debate on matters of public importance."

Citing *Pickering*, 391 U.S. at 573.

The Court concluded that Chappel's speech related to matters of public concern because, as the Court noted, "speech on matters direct affecting the health and safety of the public is obviously a matter of public concern." *Chappel* at 578.

In the present case, as the Dissenting Opinion notes, Petitioner's speech alleged the mismanagement of public funds in the form of inadequate staffing, the failure of a deputy chief to follow proper evidence gathering procedures and the hiring of an "unqualified female police officer because of her friendship with a deputy chief." (Dissent at 17-18, Appendix at ____.)

The trial court, applying *Chappel* to these facts, granted summary judgment in favor of Petitioner (Appendix _____). The Dissent, again applying *Chappel*, found that Petitioner was entitled to the entry of judgment on this legal question. (Dissent at 19, Appendix ____).

However, the inconsistency does not stop here. On February 18, 2000, the Sixth Circuit, in *Lucas v. Sottile's Inc., et al.*, No. 98-1876 (6th Cir. 2-18-00), again considered the question of whether speech was protected, despite the fact that it criticized a public official and sought to promote the speakers' self-interest.

The Court recognized that the speaker,

> "repeatedly accused the Sheriff of favoritism, lack of competition and unfairness in his administration of the tow call list, alleging that the Sheriff used his authority to reward political supporters and campaign contributors at the expense of other two companies."

(Appendix ____) The Court, applying the holding in *Chappel*, stated:

> We find that the same holds true here. Plaintiffs need only show that their speech somehow related to a matter of public concern. As set forth above, with respect to the subject of favoritism and unfairness in the disbursement of public benefits, tow calls are a classic issue of community concern. (Appendix ___)

A review of the decisions in *Chappel*, *Buckley*, and *Lucas* demonstrates that the same Court has inconsistently applied the "matter of public concern" test to similar fact categories. Petitioner contends that this seems to have occurred because the majority here ignored the need to evaluate this question before turning the balancing test. Petitioner believes that guidance from this Court regarding

this error would be helpful to all parties seeking to litigate public employee "free speech" cases.

In the alternative, Petitioner requests the court to grant certiorari in order to correct the injustice which has occurred in this case. Petitioner presented the prior argument in part because it is impossible to otherwise understand how the result was reached. The decision of the trial court, and the position so clearly described in the dissent demonstrate why the majority is incorrect. Petitioner wrote about at least three (3) fundamental issues of importance: adequate police staffing of street patrols, improper evidence handling and unfair hiring practices. (Appendix ____) The majority opinion is so clearly incorrect in finding otherwise that Petitioner requests the Court, at a minimum, to grant certiorari, reverse the decision of the Court of Appeals, and allow this matter to proceed to trial on the remaining issues in the case.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted in order to allow the Court to review the relationship between the initial protection to be afforded speech by a public employee which relates in part to matters of public concern, and the balancing which must occur after the Court has determined that speech is protected.

Respectfully submitted,

GEMRICH, MOSER, BOWSER,
MURPHY & GRAHAM, LLP

/s/_____

Scott Graham
Counsel for Petitioner Patrick Buckley
222 S. Westnedge Avenue
Kalamazoo, MI 49007
Tele: (616) 382-1030
Fax: (616) 382-0703

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed September 16, 1999]

No. 98-1783

PATRICK BUCKLEY,	)
Plaintiff-Appellee,	)
	)
v.	)
	)
CITY OF PORTAGE,	)
RICHARD J. WHITE,	)
Chief of Police, Individually and in	)
his official capacity as Chief of	)
Police of the Portage Police	)
Department, jointly and severally;	)
MICHAEL L. STAMPFLER, City	)
Manager, Individually and in his	)
capacity as Portage City Manager,	)
jointly and severally,	)
Defendants-Appellants.	)
	)

OPINION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

Before: **JONES, NELSON**, and **NORRIS**, Circuit Judges.

DAVID A. NELSON, Circuit Judge. The plaintiff, a police officer in Portage, Michigan, was the publisher of a newsletter that often criticized police department officials and policies. After distributing two issues of the newsletter that allegedly violated departmental regulations, the officer was suspended for 20 days. Complaining that the suspension was in retaliation for the exercise of his First Amendment rights and that it violated his due process rights, he brought suit under 42 U.S.C. § 1983 and the Michigan Whistleblowers Protection Act. Named as defendants were the city, the police chief, and the city manager who had approved the suspension.

A qualified immunity defense asserted by the police chief and city manager was rejected by the district court. The present interlocutory appeal followed.

The appeal tums on the issue of whether the plaintiff's speech addressed matters of "public concern," one of the prerequisites to recovery under § 1983 in a case of this sort. We conclude that the newsletters in question do not address matters of public concern. The denial of qualified immunity will therefore be reversed.

I

Patrick Buckley, the plaintiff, has been a City of Portage police officer for 25 years. In 1992 Mr. Buckley began anonymous publication of a newsletter, *The Lookout,* devoted largely to internal police department matters. Copies of the newsletter were distributed to Portage police officers and to individual members of the public, as well as to Western Michigan University, the *Kalamazoo Gazette,* and others. Central to this cause of action are issues 80 and 81 of *The Lookout,* published in March of 1997.

Issue 80 contained, among other things, two articles that discussed police chief Richard White's policy of allowing officers to earn overtime pay for attending committee meetings, notwithstanding that overtime pay was not authorized for the performance of street patrol duties. One article questioned whether "the citizens of Portage are getting short changed." Issue 81 resumed the challenge to Chief White's policy regarding overtime pay, adverting this time to the availability of overtime pay for a physical fitness testing program. The article complained that because of the unavailability of overtime pay for street patrol work, patrol officers often worked with only four officers on the street.

Issue 81 also contained a report of a deputy police chief's alleged mishandling of a purse retrieved from a fire scene. The deputy chief took possession of the purse at the direction of the fire chief. Upon returning to the police station, the deputy chief gave the purse to a junior officer with instructions to store the purse for safe-keeping. The junior officer placed the purse in a file cabinet, and forgot about it. The officer was off work for the next three days; upon return

to work, he remembered the purse and turned it over to another officer. The article on this incident implied that the deputy chief's handling of the purse was highly improper. The article questioned why the deputy chief never told anyone that he took the purse, whether anything was missing from the purse, and whether the fire department (which is the agency in charge of a fire scene) was aware of the removal of the purse.

Another article in Issue 81 suggested that a newly hired female officer received her position only because of her friendship with the deputy chief. The article questioned whether proper procedures were followed in hiring the female officer, and it suggested that the deputy chief lacked integrity.

Issues 80 and 81 led to two internal investigations at the Portage police department. The firefighters' union expressed outrage about the alleged mishandling of property at a fire scene, and this prompted Chief White to retain an independent investigator to look into the matter. The independent investigator exonerated the deputy chief, concluding that the deputy chief had fulfilled his duty by turning the purse over to a junior officer.

Chief White initiated another investigation to determine whether the junior officer had acted improperly in handling the purse. As a result of this investigation, two officers were disciplined for failing to follow proper procedures for safeguarding property.

Although Chief White had previously surmised that Officer Buckley was the author of *The Lookout*, the chief's suspicions were confirmed after the internal investigations.

Chief White initially concluded that Buckley should be fired for insubordination and defamation. After meeting with City Manager Michael Stampfler, however, Chief White ultimately decided to suspend Buckley for 20 days. A written notice of suspension informed the officer that he was being disciplined for his insubordination and criticism of department members and policies and for spreading rumors and gossip. The officer responded by filing the present lawsuit.

The parties stipulated to dismissal of the Michigan Whistleblower's claim. After the filing of cross motions for summary judgment, the district court determined that the defendants were entitled to judgment on the due process claim. Mr. Buckley's First Amendment claim, however, survived summary judgment. As to the individual defendants' qualified immunity defense, the district court determined that Buckley's speech addressed matters of public concern. The court further determined that there were genuine issues of fact as to whether the city's interest in the efficient operation of its police department outweighed Buckley's right to speak. Finally, the court concluded that defendants White and Stampfler were policymakers for the city, which meant that the city was potentially subject to § 1983 liability for their actions. These conclusions were memorialized in an order of June 10, 1998.

The defendants brought the present interlocutory appeal to challenge the district court's rejection of the qualified immunity defense and the court's conclusion that White and Stampfler were city policymakers. Mr. Buckley filed a motion to dismiss the appeal for lack of jurisdiction. We deferred ruling on the motion until after oral argument.

Having had the benefit of full briefing and oral argument, we conclude that we have jurisdiction to determine whether Issues 80 and 81 of *The Lookout* addressed matters of public concern and could thus support Mr. Buckley's claim that his suspension violated the First Amendment. As noted in the next part of this opinion, the question whether a constitutional violation occurred is the threshold question to be answered in an appeal of this sort.

II

The defense of qualified immunity shields government officials performing discretionary functions from civil damages as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). To determine whether officials are entitled to qualified immunity, "we look first to determine whether, based on applicable law, a constitutional violation occurred . . . [and] [i]f we find a violation, we then consider whether it involved clearly established constitutional rights of which a reasonable person wold have known." *Chappel v. Montgomery County Fire Prot. Dist. No. 1,* 131 F.3d 564, 573 (6th Cir. 1997) (internal quotations omitted).

To establish a violation of his First Amendment rights, Mr. Buckley must demonstrate that he spoke on matters of public concern and that his interest in speaking was not outweighed by the city's interest in promoting the efficient operation of the police department. See *Connick v. Myers,* 461 U.S. 138 (1983).

Whether speech addresses a matter of public concern -- and thus is entitled to constitutional protection -- is a question of law to be "determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick,* 461 U.S. at 147-48. In order to conclude that speech addresses a matter of public concern, "this court must be able to fairly characterize the expression as relating to any matter of political, social, or other concern to the community." *Rahn v. Drake Center, Inc.,* 31 F.3d 407, 412 (6th Cir. 1994).

The line between protected and unprotected employee speech is often difficult to draw in practice. At first blush, nearly everything a government employee says about the entity he serves would appear to be a matter of concern to the public. The Supreme Court, however, has made it clear that the category of protected speech is not this broad:

> ". . . when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick v. Myers,* 461 U.S. 138, 147 (1983).

Mr. Buckley maintains that Issues 80 and 81 of his newsletter address three matters of public concern: the lack of overtime pay available to patrol officers, the alleged mishandling of property taken from a fire scene, and the

alleged failure to follow proper procedure in the hiring of an officer. Upon *de novo* review, we conclude that Mr. Buckley was speaking "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest. . . ." *Id.*

In articles entitled "Committees," "Rules Change Again," and "Open Letter to Chip," Mr. Buckley expresses dissatisfaction with Chief White's allocation of funds for overtime pay. Buckley begins by detailing the numerous – and, in his opinion, unnecessary – committees established by Chief White. Buckley explains that officers who attend committee meetings may earn overtime pay, in contrast to officers performing patrol functions. This means, according to Mr. Buckley, that fewer officers are on the street and "the citizens of Portage are getting short changed."

A close review of the content of these articles reveals that their primary focus is on the unavailability of overtime pay for patrol officers, not on the effect that the lack of such pay may have on the citizens of Portage. In this regard the articles are much like the speech at issue in *Rahn v. Drake Center, supra.* There a nurse sued her former employer, a hospital, claiming that she was fired for issuing a press release criticizing the hospital president's proposal for spending funds raised through a public tax levy. This court concluded that, despite the critical comments on how public monies were being spent, the speech did not address a matter of public concern. The court reasoned as follows:

> "Here, the fact that [the plaintiff] believed that the money was not being spent in a wise fashion, by itself, is insufficient to find that the

> press release addressed a matter of public concern. In addition, the reference to 'patient endangerment' does not make this a matter of public concern under the facts in this case. The only mention of patient endangerment in the press release is located in the following paragraph: 'New work rules which have caused widespread discontent among the hospital staff which has created a high absenteeism, possibly developing a patient endangerment situation." [sic] The focus of this comment is not on patient endangerment arising from the misapplication of tax dollars; rather, the focus is on the employees' discontent with new *work* rules which *might* lead to a patient endangerment situation. This is 'nothing more than an example of the quintessential employee beef: management has acted incompetently.'" 31 F.3d at 412-13 (internal quotations omitted).

When Mr. Buckley's articles are read in context, it is clear that his complaints center on Chief White's allocation of department funds for overtime pay. This is a matter of workplace concern, but in and of itself it is not a matter of public concern. See *Barnes v. McDowell,* 848 F.2d 725, 734 (6th Cir. 1988) ("The mere fact that public monies and government efficiency are related to the subject of a public employee's speech do not, by themselves, qualify that speech as being addressed to a matter of public concern.") Buckley does comment that the citizens of Portage are getting short-changed, but he does so only after noting that fewer patrol officers on the street means that only half the officers can take

a lunch break. The passing reference to the citizens of Portage, as *Rahn* teaches, is not enough to transform a beef about internal department funding allocations into comment on a matter of public concern.

Mr. Buckley also maintains that his articles on the deputy chiefs alleged mishandling of the purse and his alleged role in the hiring of the female officer address matters of public concern. Again we disagree.

In pieces entitled "Integrity: Part Deux" and "Integrity: My Ass," Mr. Buckley essentially complains that the deputy chief failed to follow proper internal procedure. This failure, the articles conclude, evinces the deputy chief's lack of integrity, morals, and scruples. Referring to the deputy chief, Mr. Buckley writes,

> "This is the fair haired boy. This guy can do no wrong. Unlike the rest of us, he has no faults and he has managed to convince certain folks of this. He has proven time and again that he has no morals or scruples but you've got to admit, he has *chutzpah*. And he believes he has integrity."

Although we are mindful that complaints of corruption and illegal behavior are matters of public concern, we do not believe that every slighting reference by a government employee to an alleged lack of character and indifference to internal operating rules on the part of the top brass amounts to a matter of public concern. As the Supreme Court reasoned in *Connick v. Myers*,

> "To presume that all matters which transpire within a governmental office are of public concern would mean that virtually every remark -- and certainly every criticism directed at a public official -- would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." 461 U.S. at 149.

Mr. Buckley's unflattering view of the integrity, morals, and scruples of the deputy chief -- even when supported with examples of the deputy chief's alleged failings -- is a personal matter, not a public one. We are simply not persuaded that Mr. Buckley's expressions of disdain for his superiors meet the constitutionally mandated "public concern" test.

Because Mr. Buckley has failed to demonstrate a violation of the Constitution, the individual defendants are entitled to dismissal of the plaintiff's constitutional case. We therefore reverse the June 10, 1998, order of the district court to the extent it withheld immunity from White and Stampfler with respect to Mr. Buckley's First Amendment claims.

We turn now to the city's appeal. The city argues that the district court erred in concluding as a matter of law that Chief White and City Manager Stampfler were city policymakers. Mr. Buckley responds -- correctly, in our view -- that this court does not have jurisdiction to review such a

conclusion in this interlocutory appeal. Given the panel's determination that Mr. Buckley has failed to demonstrate a constitutional violation, however, Mr. Buckley's First Amendment claim against the city is necessarily resolved. See *Mattox v. City of Forest Park,* slip opinion 98-3379 (6th Cir. July I3, 1999) ("Because the court decided that no constitutional violation had occurred at all, it necessarily resolved the [the city's] summary judgment motion as well").

The June 10, 1998, order of the district court is **REVERSED**, and the case is **REMANDED** to the district court for entry of judgment in favor of the defendants on Mr. Buckley's First Amendment claim.

NATHANIEL R. JONES, Circuit Judge, dissenting. The majority reverses the district court's denial of qualified immunity to the defendants in this case because it concludes that topics such as lack of overtime pay for police patrolling, improper hiring practices by a public agency, and mishandling of evidence taken from a fire scene are not "matters of public concern," but rather "matters only of personal interest" to Buckley. Because I cannot agree with the majority, I dissent.[1]

A defendant is not entitled to qualified immunity if the plaintiff asserts a violation of a known constitutional right that was "so clearly established at the time in question that a reasonable official in the defendant's position would have known that he was violating the plaintiff's constitutional rights." *Jackson v. Leighton,* 168 F.3d 903, 909 (6th Cir. 1999) (quotations and citation omitted). All public officials are charged with knowing that public employees may not be disciplined for engaging in First Amendment protected speech. *Chappel v. Montgomery County Fire Protection Dist. No. 1,* 131 F.3d 564, 580 (6th Cir. 1997) (Ryan, J.). It is well-accepted that published newsletters such as the *Lookout* come within the First Amendment framework. *See, e.g., American Postal Workers Union, AFL-CIO v. United States Postal Serv.,* 830 F.2d 294 (D.C. Cir. 1987) (employee's article in union newsletter opposing "right to work" laws); *Flynn v. Giarrusso,* 321 F. Supp. 1295 (E.D. La. 1971) (newsletter critical of police administration).

---

[1] For the reasons explained in *Berryman v. Rieger,* 150 F.3d 561, 564-65 (6th Cir. 1998), we have jurisdiction in this appeal to entertain questions of law so long as the defendants "concede the best view of the facts to the plaintiff[.]"

Moreover, it should be emphasized that "if *any* part of an employee's speech, which contributes to the discharge, relates to matters of public concern, the court must conduct a balancing of interests test as set forth in *Pickering v. Board of Education,* 391 U.S. 563 [1968]." *Rahn v. Drake Ctr., Inc.*, 31 F.3d 407, 411 (6th Cir. 1994) (emphasis added). Indeed, "the entire speech of the employee does not have to address matters of public concern, as long as some portion of the speech touches upon matters of public concern." *Id.* at 412. As the majority conducts no such balancing test, it necessarily concludes that nothing in Issues 80 and 81 of the *Lookout* touched upon public concern.

Contrary to the majority's view, I believe that Buckley's speech clearly consisted of at least three matters of public concern. First, as recognized by the majority, Buckley criticizes the allocation of funds for overtime pay for police officers. Specifically, Buckley faulted the policy of allowing overtime pay for police officers when they serve on internal committees, but not when they go to "Ninja training" (which officers were requested to do on their off-days), or when they perform patrol duties longer than normal hours. The relevant portion of the speech reads as follows:

RULES CHANGE AGAIN

> What's my point? The administration (Blinkin) asks an officer to change his days off so he can go to Ninja training without being paid overtime. Being a person of tremendous integrity[,] this dutiful officer agrees. Uh oh! *They forgot that we have 50 or 60 people out with varying injuries and sickness so they*

realize that by giving this integrity filled officer Saturday as a day off that only four officers would be scheduled. How many months ago was it said that we wouldn't work with just four officers? O.K., so they didn't really mean it. The command officers were told that in no way, shape or form would overtime be paid. *Not only that but they realized there would only be four officers the following Saturday also.* Too bad guys. Suck it up. So what if only 2 of the 4 got lunch breaks. Who *really cared that two of the 4 were early cars so for a time period we really only had two officers out there.* We can't afford the overtime.

Sure, but we can pay tons and tons of money for all the committee meetings. There was a critical incident debriefing held that same day that was attended by four people from the police department. Two command officers and two folks on light duty. Granted, one of the light duty folks was working but you can bet your bippy that the other 3 put in for overtime. *But we work the street with four.*

I can hear Blinkin's response already. "But you had teleserve." Yes, we had teleserve. For a part of the day because he was in the debriefing. We had an officer, *not in uniform, unavailable to go out on the street even in an emergency.* Let me ask you a question, Blinkin. How many districts are there[?]

> Five. We aren't asking to put 8 or 10 officers on the street 24 hours a day *but how about just filling the districts[?] Besides the danger factor for us, the citizens of Portage are getting short changed. What kind of catastrophe is it going to take before you see the light?* What kind of reasoning is it to deny overtime to fill the districts?

J.A. at I8 (matters directly addressing public safety are emphasized); *see also* J.A. at 24 ("[W]e continue to work with 4 officers. Over 10,000 people per officer. But[,] by golly, we'll pay through the nose for those ultra productive committees. Give me a break.")

In these passages, Buckley argues repeatedly that the inefficient use of overtime funds resulted in the understaffing of patrol officers – namely, four officers for five districts. The majority holds that because Buckley only made a "passing reference"[2] to the citizens of Portage in his articles, he did not address a matter of public concern. It does not take a sophisticated reader to realize the public danger of having an inadequate amount of patrol officers within a police department. Buckley's point was obvious and needed no

---

[2] The majority's own citation of the "passing reference" to fewer lunch breaks for officers completely mischaracterizes the theme of the article. The point Buckley makes is that only two officers can take lunch breaks because so few officers were available for patrolling duties as matters stood under the current department policy.

elaboration[3] This court has already held that "[s]peech on matters directly affecting the health and safety of the public is obviously a matter of public concern." *Chappel,* 131 F.3d at 578. Other courts have explicitly held that questions of public safety and police protection are matters of vital public concern. *See, e.g., Cromer v. Brown,* 88 F. 3d 1315, 1327 (4th Cir. 1996) (claims of racial discrimination in police department put public safety at risk by the perception that black officers were discriminated against); *Hyland v. Wonder,* 972 F.2d 1129, 1137 (9th Cir. 1992); *Auriemma v. Rice,* 910 F.2d 1449, 1460 (7th Cir. 1990) (en banc) ("It would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety"). Moreover, while Portage does not have "a large metropolitan police department, the public concern for police protection and public safety is a small community is no less important." *Zorzi v. County of Putnam,* 30 F.3d 885, 897 (7th Cir. 1994).

The majority analogizes Buckley's criticisms of the allocation of overtime pay to the situation in *Rahn*, in which we held that statements made in a press release-attacking the use of funds from a recent tax levy benefitting a hospital, and the conversion of 75% of hospital beds to private status – did

---

[3] Just recently, newspapers across the country reported a district court's decision ordering cost-of-living raises for federal judges. I imagine that few, if any, of these articles took the pains (as the majority apparently requires in this case) to condescendingly explain to readers that the issue of pay raises for federal judges is a matter of public concern because qualified individuals would be less encouraged to serve on the federal bench for meager salaries. I am confident that the public understands that less compensation generally results in less service.

not address matters of public concern. *Rahn,* 31 F.3d at 412-I3. In my view, the more appropriate precedent for us to follow is *Chappel.*[4] In that case, a member of a municipal fire department was fired after he criticized his department for, among other things, financial mismanagement that would have jeopardized the implementation of a paramedic program in the community. *Chappel,* 131 F.3d at 567-68. We held that because the plaintiff had directly addressed matters regarding the health and safety of the public, his speech was protected by the First Amendment. *Id.* at 578 (matters of public safety, and gross mismanagement of public funds are "matters that are tightly near the zenith of public concern") (internal quotation and brackets omitted).

Chappel is more relevant to this case than *Rahn* because a shortage of police officers, like the lack of a paramedic program, affects services to the entire community. In *Rahn*, the speech only addressed the operations of a single central facility. Moreover, *Chappel* explained the significance of the *Barnes v. McDowell* rule cited by the majority:

> The defendants are quite right that "the mere fact that public monies and government efficiency are related to the subject of a public employee's speech does not, by itself, qualify

---

[4] At oral argument, the defendants contended that *Chappel* was inapplicable because it was decided after Buckley was fired, and therefore should not figure into the qualified immunity analysis. Buckley properly responded that *Chappel* only restated, rather than created, First Amendment law. *See, e.g., Connick v. Myers,* 461 U.S. 138, I42 (1983).

> that speech as being addressed to a matter of public concern." *Barnes v. McDowell,* 848 F.2d 725, 734 (6th Cir. 1988). This means, for example, that a public employee's complaint that a coworker spends too much time at the water cooler does not become a matter of public concern simply because that coworker is paid by the state. It does not mean, however, that speech which directly alleges the mismanagement and misappropriation of public monies is not, without more, a matter of public concern. Quite to the contrary, "public interest is near its zenith when ensuring that public organizations are being operated in accordance with the law," when "exposing graft and corruption," and when "seeing that public funds are not purloined" or wasted. *Marohnic v. Walker,* 800 F.2d 613, 616 (6th Cir. 1986); *accord Solomon v. Royal Oak Township,* 842 F.2d 862, 865-66 (6th Cir. 1988).

Chappel, 131 F.3d at 576 (brackets deleted). Along this spectrum, Buckley's speech was clearly closer to (indeed, within) the scope of mismanagement of public funds rather than complaints that a co-worker was spending too much time at the water cooler.

Maintaining an adequate number of patrol officers was not the only issue of public concern raised in Buckley's articles. He also reported that a deputy chief removed a purse from a fire scene in intentional violation of department regulations. It seems to me that the police failure to follow

proper evidence-gathering procedures -- especially for items such as wallets or purses -- addresses matters of public concern. *See Patkus v. Sangamon-Cass Consortium,* 769 F.2d 1251, 1257 (7th Cir. 1985) (telegram alleging violations of federal regulations in the course of a governmental investigation addressed matter of public concern). Buckley's reporting of the evidence mishandling was significant enough to draw the attention of members of the Portage Fire Department, who expressed displeasure to Chief White that police officers were supposedly flouting evidence-gathering procedures. These complaints led to an investigation that resulted in the discipline of two officers.

Yet another matter of public concern raised by Buckley were his allegations that the police department had hired an unqualified female police officer because of her friendship with a deputy chief. In *Chappel*, the defendants didn't even bother contesting the issue of whether charges of improper hiring practices by a public agency (specifically, nepotism) constituted matters of public concern. See *Chappel*, 131 F.3d at 577. The majority offers no reason why the improper hiring allegations raised by Buckley are different from the charges in *Chappel*. In fact, the majority devotes no substantive discussion to *Chappel* at all.

Instead, the majority views the *Lookout's* articles as nothing more than Buckley's "expressions of disdain for his superiors,"[5] and holds that Buckley's complaints regarding the

---

[5] In its recitation of the facts, the majority notes that Chief White told Buckley he had been suspended not only for insubordination, but also for spreading "rumors and gossip." The

lack of patrol officers, evidence mishandling, and improper hiring practices are somehow all "personal matters" meriting no First Amendment protection. Presumably, the majority so concludes because Buckley spoke with irreverent and disrespectful tones in the *Lookout* articles.

There are several flaws in the majority's conclusions. First, it is a hallmark principle that speech does not lose First Amendment protection merely because others find it offensive. *See, e.g., Texas v. Johnson,* 491 U.S. 397 (1989) (flag burning); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (parody advertisement); *Cohen v. California,* 403 U.S. 15 (1971) (jacket bearing words "Fuck the Draft").

Second, the majority disregards *Rahn's* rule that "the entire speech does not have to address matters of public concern, as long as some portion of the speech touches upon matters of public concern." *Rahn,* 31 F.3d at 412 (citing *Connick,* 461 U.S. at 149). While Buckley does attack the character and integrity of his superiors in the articles, it is indisputable that he is doing so within the context of raising matters of public concern – lack of patrol officers, evidence mishandling, and improper hiring practices. As I explained, I believe that any of these charges qualifies as a matter of public concern and should come within the First Amendment's ambit.

---

only plausible instances of rumors and gossip contained in the *Lookout* issues to which Chief White could possibly have been referring were the articles regarding the lack of patrol officers, the evidence mishandling, and the improper hiring practices.

Finally, it is error for the majority to characterize Buckley's speech as "unflattering," or to infer that Buckley's criticisms of his superiors were disproportionate to the alleged improprieties when determining whether the matters constituted public concerns. Such considerations are only relevant in the *Pickering* balancing test.

For the above reasons, I dissent. I would affirm the district court's denial of qualified immunity to the defendants and let the case proceed to trial.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed June 10, 1998]

No. 4:97-CV-105

PATRICK BUCKLEY, *Plaintiff,*	)
v.	)
CITY OF PORTAGE, RICHARD J. WHITE, and MICHAEL L. STAMPFLER, *Defendants.*	)

ORDER

For the reasons stated on the record on June 9, 1998,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss and/or for Summary Judgment (docket no. 45) is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED** with regard to Plaintiff's Due Process claim, and Count IV of the Second Amended Complaint is accordingly **DISMISSED**. The motion is **DENIED** with regard to the qualified immunity defense and Plaintiff's First

Amendment claims against the City and the individual Defendants in both their official and individual capacities.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment (docket no. 50) is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED** with regard to the issue of whether Plaintiff's speech addressed matters of public concern. The motion is **DENIED** in all other respects.

Pursuant to Fed. R. Civ. P. 56(d), the Court finds upon examination of the record that the following facts exist without substantial controversy:

(1) The two central articles in volume 80 of the "Lookout," entitled "Committees" and "Rules Change Again," both address public safety, a matter of public concern.

(2) The article in volume 81 of the "Lookout" entitled "Integrity: Part Deux" addresses police compliance with property-handling regulations, a matter of public concern.

(3) The article in volume 81 of the "Lookout" entitled "Integrity: My Ass" addresses the abuse of power in hiring practices and police compliance with city hiring procedures, both matters of public concern.

(4) Defendants White and Stampfler were both authorized decision-makers for the City of Portage within the meaning of Board of the County Commissioners v. Brown, 117 S. Ct. 1382 (1997). See id. at 1388-89.

The Court finds that substantial fact issues remain with regard to the factors this Court must consider in conducting the balancing test mandated by Pickering v. Board of Education of Township High School District 205, 391 U.S. 563, 88 S. Ct. 1731 (1968), including the impact of the "Lookout" articles on the Portage Police Department and the recklessness or knowledge with which Plaintiff made any false statements.

This case will continue.

Dated: June 10, 1998

/s/_____
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed December 1, 1999]

No. 98-1783

PATRICK BUCKLEY,
Plaintiff-Appellee,

v.

CITY OF PORTAGE,
RICHARD J. WHITE,
Chief of Police, Individually and in his official capacity as Chief of Police of the Portage Police Department, jointly and severally;
MICHAEL L. STAMPFLER, City Manager, Individually and in his capacity as Portage City Manager, jointly and severally,
Defendants-Appellants.

ORDER

BEFORE: JONES, NELSON, and NORRIS, Circuit Judges.

BEFORE: JONES, NELSON, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Jones would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX D

LOOKOUT

VOL. LXXX March 5, 1997

INTEGRITY???

Blinkin's favorite buzz word! He is so concerned about *our* integrity. He is always questioning the integrity of the department. Have I missed something? Has a group of citizens marched on Silly Hall demanding an investigation of our integrity? O.K., has a single person made an anonymous call to *anybody* wanting Mike Tyree to start putting Portage P.D. on the front pages? Except for our old chief, Blinkin is the only person in the entire world that has ever, slightly, remotely questioned our integrity. Don't forget that Winkin asked the FBI to come in and investigate us.

This integrity thing has been thrown out at numerous occasions in the past few weeks. We were involved in a chase that terminated with the bad guy getting in an accident. That immediately put us in jeopardy of losing our integrity. Or so thought Blinkin. Despite the fact that there was an accident reconstructionist working, at least one or two lab persons on duty and a supposed competent lieutenant in charge, this manifester of mania deems the detectives should be called in at 4 o'clock in the morning so our *integrity* isn't questioned by anybody. He calls in another lieutenant and then they sit in their own respective cars and talk on their cellulars for half the evening. *To each other!* They can't even park next to each other. They call in a detective that has no idea what a

UD-10 looks like to do the accident. They call in a school liaison officer to take photographs. All the folks that were already working were allowed to walk around with their chests pumped up because they had integrity flowing out of their ears. Of course that was all they were allowed to do that night.

This integrity stuff can go on and on but I think we all get the point. It's obviously a topic near and dear to his heart. By the way, has anybody noticed that his "intendant of integrity" has had expired plates on his company car since February 1, 1997? How's that for integrity? Flaunting the law?

COMMITTEES

Ain't life great? Chip shows up, takes an interest in us and our plight and tries to do something about some of our problems. Before you know it we have committees. I mean we have committees. No, I really mean we have COMMITTEES. There isn't a topic, subject, problem area or general concern that there isn't a committee for. We have the Equipment Evaluation committee. Don't forget the Schedule committee. We wore our guns to the Deadly Force committee. The Internal Investigations committee was feared. We bartered to get on the Trading Cards committee. We went on and on with the Narrative committee. We beat a horse to death with the Case Elements committee. We examined the Lab Equipment committee. And naturally we prayed for the Chaplain committee.

These are not all the committees we have or have had but they are the only ones I can remember. Some are defunct. They met and they met and they met. I believe one of the few

things that has occurred as a result of these committees is anybody that is a lab person wannabe was given their very own Binford Ultra Deluxe 2000 tool box. Perhaps we can now go out and purchase another Suburban to carry around one jar of black dusting powder and one jar of silver powder.

Several folks made a lot of money on these committees. We have had some people on 4 or 5 different committees. You don't even have to be assigned to the committee, you can just attend and put in your overtime slip. If you are working the folks on the street work short. If you are a dispatcher somebody else makes the overtime because they can't work with one person. So what's my point? Funny you should ask.

RULES CHANGE AGAIN

What's my point? The administration (Blinkin) asks an officer to change his days off so he can go to Ninja training without being paid overtime. Being a person of tremendous integrity this dutiful officer agrees. Uh oh! They forgot that we have 50 or 60 people out with varying injuries and sicknesses so they realize that by giving this integrity filled officer Saturday as a day off that only four officers would be scheduled. How many months ago was it said that we wouldn't work with just four officers? O.K., so they didn't really mean it. The command officers were told that in no way, shape or form would overtime be paid. Not only that but they realized there would only be four officers the following Saturday also. Too bad guys. Suck it up. So what if only 2 of the 4 got lunch breaks. Who really cared that two of the 4 were early cars so for a time period we really only had to officers out there. We can't afford the overtime.

if only 2 of the 4 got lunch breaks. Who really cared that two of the 4 were early cars so for a time period we really only had to officers out there. We can't afford the overtime.

Sure, but we can pay tons and tons of money for all the committee meetings. There was a critical incident debriefing held that same day that was attended by four people from the policy department. Two command officers and two folks on light duty. Granted, one of the light duty folks was working but you can bet your bippy that the other 3 put in for overtime. But we work the street with four.

I can hear Blinkin's response already. "But you have teleserve." Yes, we had teleserve. For part of the day because he was in the debriefing. We had an officer, not in uniform, unavailable to go out on the street even in an emergency. Let me ask you a question, Blinkin. How many districts are there. Five. We aren't asking to put 8 or 10 officers on the street 24 hours a day but how about just filling the districts. Besides the danger factor for us, the citizens of Portage are getting short changed. What kind of catastrophe is it going to take before you see the light? What kind of reasoning is it to deny overtime to fill the districts? Maybe, just maybe, you should look up the word you like so much. INTEGRITY 1. Uprightness of character; probity, honesty. 2. The condition or quality of being unimpaired or sound. 3. The state of being complete or undivided. Reread #1 and try something new and different and be honest with us for a change. Just for the heck of it try to have a little integrity.

DEAR PHOEBE

current record holder in Kalamazoo with a total of 26 Personal Protection Orders currently on file against her. Why do I allow her this format to give forth with her sage advise? I'm hoping for a Phoebe committee so I can get some more of that overtime money. Besides, she threatened to sue me.

Dear Phoebe,
I did it again. In my short career with my current employer, I have been involved in at least 15 automobile accidents. Sure, I've totaled my own car too but that's different. I really am a careful driver. It's just that certain, immovable objects keep getting in my way. Phoebe, what advise do you have for me?
Signed, (Please don't use my name. I catch enough grief)

Dear Freda,
I find it absolutely incongruous that you have not been made department head of Risk Management. There is only one person more suited for the job but I don't think Blinkin wants to move across the street.

Dear Phoebe,
You've heard the old saying, "all dressed up and no place to go"? Well, that was us. Coffee, cake, tea and crumpets. We had everything except the party hats. Granted, it wasn't really a festive occasion but we figured what the heck. All we wanted was to say good bye. And nobody showed up. We thought Mr. Red would be there for sure. And if he didn't show up it was a forgone conclusion that the 5 Redettes that voted his way would be there. But as usual, we stood alone. Phoebe, why didn't they show up at our going away party?
Signed, the 22 Unemployed DPS workers.

show up it was a forgone conclusion that the 5 Redettes that voted his way would be there. But as usual, we stood alone. Phoebe, why didn't they show up at our going away party? Signed, the 22 Unemployed DPS workers.

Dear 22,
Integrity. Lack of.

Dear Phoebe,
I know you only like to deal with the cops but maybe you can change your routine just once. A small group of us have a tiny problem. We have an official title but the dispatchers refuse to call us that. Our official term is "Battalion Chief" but for whatever reason the dispatchers continue to call us "shift commander." It may not seem like much to you but it really hurts us when we aren't given the homage we believe we have earned. We've written memos, had meetings and asked nicely but we still hear "shift commander" being used. Why?
Signed, The Three Apostles

Dear shift commanders,
You already have Chief 1, Chief 2, Chief 3 and Chief 4 arriving at each and every scene. Why don't you just use "Chief 5"? Exactly what difference does it make?

Dear Phoebe,
I hear the snickering behind my back. A person makes one little false step, falls down and gets hurt and everybody scoffs at them. I'm tired of it. I know who all the other ones have voluntarily requested surgery. And they actually believe that's a valid excuse for being off work. When others were on light duty they weren't allowed to work teleserve because it was a

Dear Craig,

Not everybody is convinced you are faking your injury. Just the other day I overheard one of the parking enforcement people talking with a crossing guard and one of them, I can't remember which one, actually believes you broke your wrist. I do have to give it to you. The cast was a nice touch.

THE FREDDIES

I would be negligent if I didn't at least mention the Fearless Freddies. Sure, "B" shift will be holding their collective breathes while they read it but eventually they'll have to exhale. I'd love to know why they think everything is directed at them. Feeling guilty?

Anyhow, men I wish you luck. I have been to a couple scenes and if you weren't in life threatening positions it might be funny. We can't get our leaders out of a restaurant for a dead body and you guys have a P.I. or a smoke investigation and you wind up with more Chiefs than Indians on the scene. There is really no need to for us to come for traffic as you can just use the vehicles from all four Chiefs to block traffic.

Don't forget to call your local constable if you find a piece of equipment missing off your truck. We will investigate any and all complaints without fail. We have resources available you wouldn't believe. FBI, CIA, Interpol and even the Foreign Legion are a mere phone call away.

you wouldn't believe. FBI, CIA, Interpol and even the Foreign Legion are a mere phone call away.

THIS AND THAT

It's going to be interesting to see how long the MVR's stay up and running now that the warranty is up as of the end of last month.

It is me or is the honeymoon period definitely over? It looks like Blinkin and Nod and back to "full steam ahead" in their old ways.

Have you noticed the Monthly Reports are repeating their Ross Perot charts and graphs? How many different way can you report how many women and men were in our jail?

I see the maintenance man went on vacation and never returned. What was our first reaction? How did you guess? Change the locks! This is the second maintenance man that we have lost and the second time we've changed the locks. Why do we fear these guys? More importantly, why do we just change the combinations when these guys had keys? Did they make terrorist threats before they quit showing up? Why didn't we change the locks when Winkin left?

We're closing in on <u>another</u> year of having no contract. Have you heard anybody crying about it? I think we've become used to it. Most of you can remember shopping at the Value-Ette. Well, it's official. I have already sent away for the INTEGRITY card that can be used all the best shops and restaurants in town. Just call 1-800-B-L-I-N-K-I-N.

VOL. LXXXI March 11, 1997

INTEGRITY: PART DEUX

It's such a wonderful word. Integrity! It really has a ring to it. Especially when said by a certain deputy chief. Last week we were given the definition of integrity. It's a word that this certain D/C lives by and makes, nay, forces us to live by.

A certain detective was called in by one of his superiors. This detective had been involved in the investigation about a house fire where a person was killed. This supervisor handed the investigator a purse, bound up in one of our new *seal-a-meal* bags. "What is this?" inquired the puzzled snoop. "It's a purse" responded the always alert three stripper. "But whose purse is it?" continued the flatfoot. "The victim from the fire" said the overseer.

Now the perplexed copper was really beside himself. He knew that he hadn't taken any property and especially hadn't taken a purse, from the fire scene. He then began questioning his own investigative skills but soon remembered he had assistance. But to the best of his knowledge the fellow detector hadn't removed any property from the scene either. But being a thorough investigator he asked, "Did my partner take this purse?" The sergeant merely shrugged to indicate "no".

Now the detective was really befuddled. He scratched his head. He rubbed his chin, He cocked his head at an angle similar to a bewildered dog. For the life of him he couldn't understand where this purse came from but finally his detection sense came to life and he realized the person sitting

in front of him may have the answer. After all, he had the purse.

"Well if I didn't take it and my partner didn't take it, who took the purse from the fire scene?" The taskmaster squirmed in his swivel chair and small beads of sweat were seen popping out of his upper lip. It seemed as if he had just eaten an entire box of saltines without any liquid refreshment. His heart was beating so loudly it could be heard in the next office. No words came out of his mouth. The detective thought maybe the question was too compound for somebody in a leadership position to understand so he shortened the question and put it to the supervisor again. "Who took the purse?"

The words came out below whisper level. Discrete muttering's to your lover on a public bus are said louder. It was quiet but the detective, with 20/20 hearing, couldn't mistake what was said. "The deputy chief."

Oh boy, the trained investigator couldn't stop now. Questions came flying out of his mouth."Why did the deputy chief take the purse? Why did the deputy chief take any property? Why didn't the deputy chief turn the property over to the evidence technician? Why wasn't the victim's family advised of this? What was in the purse? Where is the required property sheet? Why was the deputy chief even inside the house? Has the deputy chief ever read, seen, discussed, perused, scrutinized or even checked General Order #3? What am I supposed to tell the victims partner?"

The questions continued but there were no answers. The purse had been sealed in the plastic bag so it was obviously

rotting and decaying before their very eyes. It hadn't been dried before it was sealed.

Reluctantly the savvy snoop picked the bagged purse up and made contact with the victims significant other. He had questions. "Why did you take the purse? You told me you hadn't taken anything. Is there anything missing from the purse? What did you find inside the purse? What exactly were you looking for in the purse?" Questions upon questions. But the poor purse purveyor had just as many answers as his immediate supervisor had given him. Questions! What was the need for the deputy chief to enter the burned home? Why was the purse picked up by the deputy chief? Why was the purse removed from the scene? Why weren't any of the investigators informed of the purse removal? Excluding sections on drugs, why was *every* section of the General Order #3 regarding evidence/property totally ignored? Are you aware that several officers, below the rank of deputy chief, have been suspended for mishandling property? Did he think he was in charge? Maybe he had better read General Order #11 too so he understands how in these types of incidents "the Police Department operates under the authority of the Fire Department." Was the Fire Department told a purse was removed from the house while they were still in charge of the scene? What kind of response did he expect to be given to the receiver of the purse? Why wasn't a property record completed? Why wasn't there an inventory of the contents? Was the purse kept in his locker for the week he had it? (yes folks, it was not the following day it was to be returned) Was it taken home with him or kept in his office? Where was the purse for the 6 days or so that he had possession of it?

My questions continued. You have more. I would guess that Chip will follow his normal path and have none. An internal investigation? You have got to be kidding. This is the fair haired boy. This guy can do no wrong. Unlike the rest of us, he has no faults and he has managed to convince certain folks of this. He had proven time and again that he has no morals or scruples but you've got to admit, he has *chutzpah*. And he believes he has integrity.

INTEGRITY: MY ASS

I apologize. I don't normally take to using that kind of language with members of the opposite sex present but this was the kicker. Another deputy chief story. Another chapter in the continuing saga of Integrity 101 as taught by a certain deputy chief.

I won't even attempt to humor this one up. I believe a lot of you are already aware of its as I've heard the story several times. I've even been told by command officers.

We have a police officer position open. We have known this for some time. A certain person applied for the position and wrote on her application that she was friends with a certain deputy chief. A detective was assigned to do the background investigation on the potential hiree who for unknown reasons quit her job.

There were problems at the very beginning with the background. There is no need for us to know all that but the bottom line is the investigator completed the background and recommended the applicant *not be hired*.

Bad move for the investigator. The deputy chief ordered another background investigation and the detective was ordered not to put a recommendation in the report.

It seems there were some discrepancies in the applicants story so she was called in for another interview. The deputy chief suggested this so it could be cleared up if they were just misunderstandings. The applicant supposedly wasn't contacted by the deputy chief prior to the second interview but 'lo and behold if the applicant didn't enter the room and to right down the list of the "misunderstandings" in an attempt to clarify everything. The interviewer didn't need to ask a thing. The applicant obviously has ESP so maybe we should hire her. She has to have ESP because her *friend* said he didn't talk to her.

It has been rumored that the potential officer quit her job because she was promised the Portage position around Christmas time by a certain deputy chief.

If you are friends with a person or their family and that person applied for a job with you, wouldn't the instructor in your Integrity 101 class tell you that you should distance yourself from having anything to do with the hiring process? I would think that if there was the slightest question of impropriety you would hide under your desk and not say a word. But not Mr. Integrity. He steps to the forefront and takes an active role. The applicant goes from friend... to the families are friends... to maybe we've met in the past.

Where were the damsel from Employee Development? Were they aware of the first background investigation with a negative recommendation? What happened to the "best of

three" theory they preach with everything? Another background investigation hasn't been conducted in over six months. What were they compairing this one to? Certain command officers have advised me there are a number of applicants on file with far superior qualifications and experience. Where are their applications and background investigations?

I'm sorry but this thing stinks. It stinks no matter which way you turn. If I had a family member or a friend apply for a job here I would tell whoever asks that they would be an excellent choice and would do a good job and then make a hasty retreat. I wouldn't become actively involved in the process, promise a job or try to rewrite background checks. Do you know why? Because I have integrity. It wasn't forced on me. I was brought up by parents that instilled certain traits in me. My integrity was firmly entrenched in me long before a certain deputy chief tried to mold me.

OPEN LETTER TO CHIP

You came in here like a breath of fresh air. You made a few changes immediately. Changes that needed to be made. You were sociable, something we were unused to with the old regime. You came out and talked *with* us and didn't hide in the office. You created numerous committees which at the time made us feel we were accomplishing something. Your dunderheads directly below you took a wait and see attitude and remained very quiet for a time period. You were "talking the talk". Will, it's about time you started "walking the walk".

This is our department. You are our leader. If you are going to lead this *band* maybe you better pick up the *baton*. Are you kept in the dark like old Winkin was? Are the two *grifters* making policy and decisions that you are unaware of?

Did you know of the purse incident? Was anything done about it? How about the latest hiree? Don't ask Blinkin and Nod about this as they do the two step better than any instructors at the Arthur Murray Studios and after you would ask them about it, about the only thing you would be somewhat sure of is that it might be 1997.

I personally know you are aware of one of the latest decrees. The one where we won't pay overtime to fill the districts. One of your deputy chiefs already has said overtime is available for the physical fitness program testing. We don't even have the program yet but the overtime is approved. And we continue to work with 4 officers. Over 10,000 people per officer. But by golly, we'll pay through the nose for those ultra productive committees. Give me a break.

Were you aware that all the detectives will be home before the street lights come on now? Powers that be put their collective heads together and determined that there is absolutely nothing that needs to be detected after it turns dark. They will continue to work 10 hour days but they will all be on one shift - 0800 to 1800 hours. Sure, the collective heads will work 8 hour shifts to there will be a six hour overlap of command. And naturally two of the detectives will take their pagers home *"just in case they are needed"*. Talk about overtime! But we'll still work the streets without all the districts being filled.

Talk to your other supervisors. There has been talk of another *Black Thursday* where they march enmasse to City Hall to complain. If they could take a pill to get a backbone they would have talked to you directly before not. Chip you are not a moron. The handwriting was on the wall before you even got here. A couple of gallons of whitewash was thrown on the wall by a couple of deputy chiefs but it's more than obvious that the whitewash is gone. The peacocks have spread their tail feathers and we are paying the price. Before we start seeing PPD splashed across the front pages of the Gazette I would suggest that you take charge, roll up your sleeves, pick up that baton and start leading us into the 21st century.

EPILOGUE

People have accused me of making most of this stuff up and branding it as fantasy. Those of us that work here are aware that, unfortunately this junk is true. There might have been a time or two that something was embellished but for the most part it is entirely, 100% the whole truth.

I hope this issue is seen for what it really is. A message to a certain person or persons that, despite what they think and believe, we are a group of the most dedicated and honest law enforcement officers around. I am proud to work with this group with the highest amount of integrity known to man. Thank you.

Supreme Court, U.S.
FILED
MAY 26 2000
CLERK

(2)

No. 99-1743

IN THE

Supreme Court of the United States

PATRICK BUCKLEY,

Petitioner,

v.

CITY OF PORTAGE; RICHARD J. WHITE, Chief of Police, Individually and in his official Capacity as Chief of Police of the Portage Police Department, Jointly and Severally; MICHAEL L. STAMPFLER, City Manager, Individually and in his capacity as Portage City Manager, Jointly and Severally,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

JOSEPH NIMAKO
Counsel of Record
KAREN KUCHEK SUTLIFF
CUMMINGS, MCCLOREY, DAVIS
& ACHO, P.L.C.
Attorneys for Respondents
33900 Schoolcraft
Livonia, Michigan 48150-1392
(734) 261-2400

159999

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

14PP

QUESTIONS PRESENTED

WHETHER THE COURT OF APPEALS PROPERLY APPLIED THE LAW IN CONCLUDING THAT THE PETITIONER'S SPEECH DID NOT ADDRESS A MATTER OF PUBLIC CONCERN WHERE JUDGED BY THE CONTENT AND THE CONTEXT THE PRIMARY FOCUS OF THE SPEECH WAS ON EMPLOYEE GRIEVANCE AND DEPARTMENT POLICY AND PROCEDURES?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	3
The Petition For Writ Of Certiorari Should Be Denied Because The Court Of Appeals Correctly Applied The Relevant Case Law And The Decision Is Consistent With Prior Decisions Of The Sixth Circuit.	3
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Barnes v. McDowell, 848 F.2d 725 (6th Cir. 1988) .. 4, 9

Chappel v. Montgomery County Fire Protection District No. 1, 131 F.3d 564 (6th Cir. 1997) ... 9

Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) 4, 5, 9

Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) 4

Rahn v. Drake Center, Inc., 31 F.3d 407 (6th Cir. 1994) 4, 7, 8

Thompson v. Scheid, 977 F.2d 1017 (6th Cir. 1992) . 9

Statute:

42 U.S.C. § 1983 2

United States Constitution:

First Amendment 3

STATEMENT OF THE CASE

The Petitioner, Patrick Buckley, is a police officer who has been employed by the City of Portage Police Department for 25 years. Over a period of five years, beginning in 1992, Petitioner anonymously published 81 issues of a newsletter, The Lookout, that often criticized police department officials and policies. The publication of issues 80 and 81 of The Lookout in March of 1997 led to the suspension of Petitioner for 20 days for violating departmental regulations.

Issue 80, published on March 5, 1997, included articles entitled "Committees" and "Rules Change Again". The two articles criticized Police Chief Richard White's policy of paying overtime for officers attending committee meetings and not for officers on street patrol duties. One article remarked that "the citizens of Portage are getting shortchanged".

Issue 81, published on March 11, 1997, contained articles entitled "Integrity: Part Deux", "Integrity: My Ass", and "Open Letter to Chip". The article entitled "Open Letter to Chip" repeated Petitioner's criticism of the policy regarding overtime, indicating that overtime pay had been approved for a physical fitness testing program. The article points out that due to the unavailability of overtime pay for officers on street patrol duties, the Department has only four officers to patrol the streets.

Issue 81 also contained a report of a deputy police chief's alleged mishandling of a purse retrieved from a fire scene. Additionally, Issue 81 contained an article asserting that the Department failed to follow proper procedures in hiring a female officer and suggesting that the officer was hired because she was a friend of a deputy chief.

The publication of the two issues of the Lookout led to two internal investigations. Chief White retained an independent investigator to look into the alleged mishandling of the purse at the fire scene. It was established that the deputy chief took possession of the purse at the direction of the fire chief. Upon returning to the police station, the deputy chief handed the purse to a junior officer for safekeeping. The junior officer placed the purse in a file cabinet and forgot about it. The officer went on off-duty for three days. When he returned to work, the officer remembered the purse and turned it over to another officer.

The deputy chief was exonerated by the independent investigator who concluded that the deputy chief had fulfilled his duty by turning the purse over to a junior officer.

The second internal investigation was to determine whether the junior officer had acted properly in handling the purse. The investigation resulted in the disciplining of the two officers for failure to follow proper procedures for safeguarding property.

These investigations confirmed the chief's suspicion that Petitioner was the author of The Lookout. Chief White therefore decided to suspend Petitioner for 20 days for insubordination and criticism of department officials and policies and for spreading rumors and gossip in violation of department regulations.

As a result of his suspension, the Petitioner brought this action under 42 U.S.C. § 1983 asserting, inter alia, that his suspension was in retaliation for the exercise of his First Amendment rights. The United States District Court for the Eastern District of Michigan denied Defendants' Motion for

Summary Judgment on grounds of qualified immunity. The Court of Appeals reversed, holding that the articles in question did not address matters of public concern and therefore Petitioner was not constitutionally protected from the adverse employment action taken against the Petitioner by Chief White.

REASONS FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY APPLIED THE RELEVANT CASE LAW AND THE DECISION IS CONSISTENT WITH PRIOR DECISIONS OF THE SIXTH CIRCUIT.

Pared to its essence, the Petitioner's argument is that the Court of Appeals erroneously determined that the Petitioner's speech did not address a matter of public concern and thus, was not protected under the First Amendment. The Petitioner contends that the present case is an example of the Court's confusing concepts about employee speech protection under the First Amendment, thereby leading to inconsistent decisions. Petitioner bases his argument on a misinterpretation of the holding of the Court of Appeals. Contrary to Petitioner's assertion, the Court of Appeals did not resolve "the factual issue of whether the disruption to the City outweighed the Petitioner's right to publish the speech." The Court of Appeals also did not conclude, as claimed by Petitioner, that "only a portion of the speech was directed at matters of public concern."

The law is clear that the threshold inquiry is whether the speech that Plaintiff cites as a basis for his suspension may be fairly characterized as constituting speech on a matter

of public concern. *Rahn v. Drake Center, Inc.*, 31 F.3d 407, 411 (6th Cir. 1994). If the Plaintiff's speech did not address a matter of public concern, no further inquiry is necessary. *Id. See also Barnes v. McDowell*, 848 F.2d 725, 733 (6th Cir. 1988). The *Pickering* balance, which Petitioner alludes to here, is only triggered when the Court finds that any part of the speech relates to matters of public concern. *Id.* Thus, in the instant case, since the Court of Appeals did not determine that a portion of Petitioner's speech addressed a matter of public concern, the Court did not proceed to consider the issue of whether the disruption to the City outweighed the Petitioner's right to publish the speech.

The Court of Appeals did not commit any legal error which warrants a review by this Court. The Supreme Court in *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) provided guidance for determining whether a public employee's speech addressed a matter of public concern. The *Connick* Court held that

> when a public employee speaks not as a citizen about matters of public concern, but instead as an employee about matters only of personal interest, absent the most unusual circumstances, the Federal Court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147.

The Court in *Connick* also instructed that in determining whether the speech addressed a matter of public concern,

the Court must consider the content, form and context of the speech as revealed by the whole record. *Connick*, 461 U.S. at 147-48.

After a review of the content and context of the articles published by Petitioner in The Lookout, the Court of Appeals correctly concluded that Plaintiff was speaking "not as a citizen about matters of public concern, but instead as an employee about matters only of personal interest."

The Court of Appeals first examined the articles entitled "Committees", "Rules Change Again", and "Open Letter to Chip" which criticized Chief White's establishment of numerous committees as his style of management, allocation of funds for overtime pay for officers attending committee meetings and not for officers performing street patrol duties, and correctly concluded:

> A close review of the content of these articles reveals that their primary focus is on the inavailability of overtime pay for patrol officers, not on the effects that the lack of such pay may have on the citizens of Portage . . . When Mr. Buckley's articles are read in context, it is clear that his complaints center on Chief White's allocation of department funds for overtime pay. This is a matter of workplace concern, but in and of itself it is not a matter of public concern. See *Barnes v. McDowell*, 848 F.2d 725, 734 (6th Cir. 1988) ("The mere fact that public monies and government efficiency are related to the subject of a public employee's speech do not, by themselves, qualify that speech as being addressed to a matter of public concern.") Buckley does

> comment that the citizens of Portage are getting short-changed, but he does so only after noting that fewer patrol officers on the street means that only half the officers can take a lunch break. The passing reference to the citizens of Portage . . . is not enough to transform a beef about internal department funding allocations into comment on a matter of public concern.

With regard to the articles entitled "Integrity: Part Deux" and "Integrity: My Ass," which deal with the deputy chief's alleged mishandling of the purse, his failure to follow proper internal procedure in hiring a female officer and his alleged lack of integrity, morals, and scruples, the Court of Appeals was correct in concluding that:

> Although we are mindful that complaints of corruption and illegal behavior are matters of public concern, we do not believe that every slighting reference by a government employee to an alleged lack of character and indifference to internal operating rules on the part of the top brass amounts to a matter of public concern. As the Supreme Court reasoned in *Connick v. Myers*,
>
> > To presume that all matters which transpire within a governmental office are of public concern would mean that virtually every remark — and certainly every criticism directed at a public official — would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive

> criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs. 461 U.S. at 149.

> Mr. Buckley's unflattering view of the integrity, morals, and scruples of the deputy chief — even when supported with examples of the deputy chief's alleged failings — is a personal matter, not a public one. We are simply not persuaded that Mr. Buckley's expressions of disdain for his superiors meet the constitutionally mandated "public concern" test."

The Court of Appeals' decision in this case is consistent with its earlier decision in *Rahn*, *supra* which addressed an analogous situation. In *Rahn*, plaintiff was discharged following a press release by the committee of which she was the chair. The press release was highly critical of the new administration of the public hospital where she worked as a nurse. After complaining about misspending of public money, the press release in one paragraph talked about patient endangerment as follows:

> New work rules which have caused widespread discontent among the hospital staff which has created a high absenteeism, possibly developing a patient endangerment situation.

The plaintiff contended that because the press release commented on how public monies were being spent and also mentioned patient endangerment, it was addressing matters of public concern. Rejecting plaintiff's contention, the Court in *Rahn* reasoned:

> Here, the *fact that [the plaintiff] believed that the money was not being spent in a wise fashion, by itself, is insufficient to find that the press release addressed a matter of public concern. In addition, the reference to "patient endangerment" does not make this a matter of public concern under the facts of this case.* The only mention of patient endangerment in the press release is located in the following paragraph: "New work rules which have caused widespread discontent among the hospital staff which has created a high absenteeism, possibly developing a patient endangerment situation." [sic] *The focus of this comment is not on patient endangerment arising from the misapplication of tax dollars; rather, the focus is on the employee's discontent with new work rules which might lead to a patient endangerment situation.* This is "nothing more than an example of the quintessential employee beef: management has acted incompetently". 31 F.3d at 412-13.

(Emphasis added).

As with the press release in *Rahn*, *supra*, the focus of the articles entitled "Committees", "Rules Change Again", and "Open Letter to Chip", is on Chief White's management style of establishing committees and allocation of funds for overtime pay, which are clearly the concern of employees and not public concern even though they may be of interest to the public. The focus is not on the effect the alleged improprieties would have on the citizens of Portage. Petitioner merely used the reference to the citizens of Portage to bolster his argument in support of allocation of overtime

pay for road patrol officers. Moreover, just because public money is involved does not warrant the characterization of the speech as related to matters of public concern. *Barnes, supra.*

The Court of Appeals' decision in *Chappel v. Montgomery County Fire Protection District No. 1*, 131 F.3d 564 (6th Cir. 1997) relied upon by Petitioner is distinguishable in a material respect. In *Chappel, supra*, the alleged mismanagement of public funds was linked to corruption, which has been held to be a matter of public concern deserving of constitutional protection. However, in the present case, Petitioner presented no evidence of corruption.

The articles entitled "Integrity: Part Deux" and "Integrity: My Ass" discuss the alleged failure of the deputy chief to follow internal regulations and procedures related to property handling and the hiring of an officer. Writing about matters of internal department policy and procedures, cannot be considered speaking out on matters of public concern. *See Thompson v. Scheid*, 977 F.2d 1017 (6th Cir. 1992). The Petitioner's criticism of the deputy chief for alleged lack of integrity, morals and scruples is a mere airing of personal gripes by an employee and does not rise to the level of a matter of public concern. To hold otherwise, would mean that "virtually every remark — and certainly every criticism directed at the public official — would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

JOSEPH NIMAKO
Counsel of Record
KAREN KUCHEK SUTLIFF
CUMMINGS, MCCLOREY, DAVIS
& ACHO, P.L.C.
Attorneys for Respondents
33900 Schoolcraft
Livonia, Michigan 48150-1392
(734) 261-2400